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In the

Supreme Court of the United States

OCTOBER TERM 1965

No. 1059

W. H. PAT O'BRYAN,

Petitioner,

v.

STEPHEN S. CHANDLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

STEPHEN S. CHANDLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgement of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on November 30, 1965.

Citations to Opinions below:

The Opinion of the District Court printed in Appendix C hereto, infra, p. 1-C is unreported. The Opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 1-B is reported in 352 F. 2d 987.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether judicial immunity applies to acts of Respondent, a federal district judge, guilty of violating federal criminal statutes by corruptly communicating with members of a federal grand jury for the purpose of unlawfully influencing the deliberations of the grand jury.

2. Whether the doctrine of judicial immunity extends to acts of Respondent, a federal district judge, who entered into a conspiracy with private persons to prosecute, maliciously and falsely imprison Petitioner in an attempt to silence Petitioner's protests that the co-conspirators defrauded him and plundered the assets of an alleged bankrupt corporation illegally forced into Respondent's court.

3. Whether a federal grand jury is an independent impartial body not subject to jurisdiction of a federal judge during its secret deliberations or whether it is an appendage to the court, subject to the jurisdiction, influence, and pressure of Respondent, a federal district judge, to return criminal indictments against individuals named by the judge.

4. Whether Petitioner is entitled to amend his complaint and to a trial on the merits to show acts of the conspiracy unprotected by judicial immunity or whether Respondent may flaunt all rules of law, immune from any legal action.

STATUTES INVOLVED

The Statutory provisions involved are: United States Criminal Code, Title 18, U.S.C.A. Secs. 1503, 1504, 2071 and 2073 and Rule 15(a), Federal Rules of Civil Procedure. The statutes are printed in Appendix A, infra, p. A-1.

STATEMENT

1. Introduction

The Statement is lengthy because of the extraordinary character of this case. It is part of the litigation involving Judge Chandler that prompted The Judicial Council of The Tenth Circuit to issue its order to Judge Chandler. The Statement shows, in part, that Chandler acts as though he is bound by no rules of law and is above the law. The Statement also shows that the opinion below is erroneously based on inferences favorable to Chandler and does not come to grips with the facts alleged in Petitioners complaint although such facts are to be taken as true on motion to dismiss.

The Petitioner, Pat O'Bryan, brought this suit on September 25, 1963 in the District Court of Oklahoma County, State of Oklahoma, against Stephen S. Chandler, Respondent, a United States District Judge for the Western District of Oklahoma for damages caused by malicious prosecution, false imprisonment, libel and slander. (O'Bryan's Petition*, pp. 1-15). The suit was filed after a criminal indictment against Petitioner, procured illegally by Judge Chandler, was dsmissed (Exhibit D, p. xxxix, attached to Plaintiff's Petition.)

* Petitioner as plaintiff filed his petition with exhibits in the District Court of Oklahoma County. This document was printed (with green cover) and made a part of the Transcript of Record by reference (R. 2). It will be referred to thusly: (Petition p. .....)

Respondent's Petition For Removal was granted, and the cause of action was removed to the Federal District Court (P. 1, 2). Respondent filed many dilatory pleas including a Motion To Dismiss (R. 28). Respondent's Motion To Dismiss was sustained by the Trial Court (opinion, Appendix C. p. 1-C). Petitioner timely filed Motion to Reconsider (R. 48) and Motion For New Trial (R. 50). Petitioner also asked leave to amend his complaint (R. 93-95). The Trial Court entered an order on July 29, 1964, overruling Petitioner's Motion To Reconsider and Motion For New Trial (R. 53), and on the same date entered an order that the filing of Petitioner's amended complaint should neither be permitted nor denied but should be lodged with the Clerk of the United States District Court for the Western District of Oklahoma (R. 54). The trial judge refused to look at or consider the amended complaint and made a statement in open court to the effect that if Petitioner had a right to amend his complaint it was up to the Circuit Court of Appeals to tell the Trial Court so (R. 95). No responsive pleading by Respondent has ever been served or filed.

II. Petitioner's Amended Complaint Alleges Conspiracy By Respondent Chandler And Others To Defraud, To Silence, And To Prosecute Maliciously And Imprison Petitioner So He Could Not Interfere With Their Plan To Plunder And Embezzle Assets Of Selected Investments Corporation.

Petitioner's amended complaint alleges that beginning in 1958 Respondent Chandler together with certain other de-

fendants named in the complaint entered into a plan, scheme, and conspiracy to cheat, swindle, and defraud Petitioner of a fee he had rightfully earned working five years as Tax Attorney, resulting in a savings of between seven and eleven million dollars, for Selected Investments Corporation and Selected Investments Trust Fund (R. 57-58); that said defendants were agents and co-conspirators of and with each and every other defendant in the promulgation and carrying out of such plans, schemes, and conspiracy (R. 57-58); among the purposes of the conspiracy was to silence Petitioner so he would not interfere with the plan of the defendants to embezzle the assets of Selected Investments Corporation and Selected Investments Trust Fund and to cheat and defraud Petitioner of his fee so the conspirators would have that much more of the assets of Selected Investments Corporation and Selected Investments Trust Fund themselves (R. 58-59); that defendants conspired to silence and imprison Petitioner by falsely and fraudulently causing Petitioner to be indicted and convicted of a concocted crime (R. 59).

The amended complaint points out that Selected Investments Corporation received a favorable court decision for state income tax payments in the case of *Selection Investments Corporation v. Oklahoma Tax Commission*, 309 P. 2d 267 (Okla. Sup. Ct. 1957) as a result of a $150,000 bribe paid to certain members of the Oklahoma Supreme Court (R. 59-60); that the Internal Revenue Service of the United States Treasury Department, following the lead of the Oklahoma Tax Commission examined the 1950 and 1951 tax

returns of Selected Investments Corporation and Selected Investments Trust Fund and in 1953 delivered statements of proposed tax adjustments (R. 60); that Petitioner was employed as tax attorney to work on the Federal tax case and after five years of work involving intricate accounting and legal questions obtained a ruling sustaining the tax deductions of 1956 and prior years which resulted in a savings of between seven and ten million dollars (R. 61). However, the ruling also required a reorganization of Selected Investments Corporation, and an orderly reorganization was begun under auspices of the District Court of Oklahoma County.

Co-conspirators C. A. Vose and Hugh Harrell, acting under a preconceived plan and conspiracy with Respondent Chandler to eliminate Selected Investments Corporation and Selected Investments Trust Fund as a competitor of the First National Bank and Trust Company of Oklahoma City, and to plunder its assets attempted to get Hugh A. Carroll, President of Selected Investments to agree to permit the First National Bank and Trust Company of Oklahoma City to handle the reorganizations of Selected Investments Corporation and Selected Investments Trust Fund; told Carroll that the matter of reorganization of these organizations had been discussed thoroughly with Chandler outside of the Court Room; that Vose and Harrell stated that if these organizations were transferred to Judge Chandler's court, such reorganization would be accomplished and completed within a matter of sixty to ninety days. Carroll requested instruments in writing agreeing to deliver control

of the reorganized firms to him and his associates when such reorganization was completed within a matter of sixty to ninety days thereafter. Vose and Harrell refused to make such an agreement (R. 62).

On March 3, 1958 there was filed in the United States District Court for the Western District of Oklahoma, Case No. 10680—Bankruptcy, an involuntary action in bankruptcy. On the same date Chandler entered an order to remove the case from the District Court of Oklahoma County, Oklahoma to the United States District Court for the Western District of Oklahoma. On that date Selected Investments Corporation and Selected Investments Trust Fund had combined assets of approximately $39,000,000; and had neither failed or refused to pay any of its obligation (R. 61, 62).

During bankruptcy proceedings assets of Selected Investments Corporation and Selected Investments Trust Fund were plundered and embezzled by the conspirators by such means as selling for a small fraction of its value, 77.2 acres of valuable land known as the Capitol Gate property in Oklahoma City to the United Founders Corporation. That corporation was incorporated by John C. Andrews, John Joseph Snider, and Frank A. Gregory, members or employees of the law firm of Mosteller, Fellers, Andrews, and Loving. Mosteller is Chairman of the Board of Directors of the United Founders Corporation. The law firm of Mosteller, Fellers, Andrews, and Loving also received fees at the hand of Respondent Chandler from the funds and assets of Se-

lected Investments Corporation and Selected Investments Trust Fund in excess of $105,000; over all Respondent Chandler allowed, permitted, and ordered payments of over one million five hundred thousand dollars ($1,500,000) of the funds of Selected Investments Corporation and Selected Investments Trust Fund funds to various attorneys. Also the firm of Mosteller, Fellers, Andrews, and Loving were active participants in depriving Petitioner of his fee for services rendered to Selected Investments Corporation and Selected Investments Trust Fund and in furtherance of that plan, scheme, and conspiracy have been active participants in procuring the false indictment against Petitioner (R. 62-63).

III. Summary of Pertinent Allegations Of Acts Committed By Judge Chandler In Violation Of Law, Without Jurisdiction, Authority, Or Color Of Authority.

A. *Acts directed against Petitioner by Respondent outside the Grand Jury Room.*

Judge Chandler deprived plaintiff of all compensation due for five years' services expenses and costs Petitioner expended in connection with Petitioner's successful prosecuting certain important tax cases for Selected Investments Corporation (Petition p. 10. 11).

Respondent unilaterally by his individual order, without notice or hearing, unlawfully disbarred plaintiff from the practice of law in the United States District Court. Respondent also sought plaintiff's disbarment from the practice of

law and accounting in Oklahoma and before the United States Treasury Department (Petition p. 11).

Since 1959 Judge Chandler made repeated attempts to get two different United States Attorneys to prosecute O'Bryan, although these attorneys told Chandler that O'Bryan had not committed an indictable offense. Prior to the Grand Jury session of November 1961 Respondent again tried to get United States Attorney B. Andrew Potter to prosecute Petitioner but was again told there was no evidence to convict O'Bryan. (Petition p. 3 and page xxxi of its appendix).

Prior to the Grand Jury session beginning November 7, 1961, Chandler contacted Tellus B. Hendrick (whom he had appointed Foreman of the Grand Jury) at Hendrick's home and elsewhere; told Hendrick that Petitioner was guilty of filing a false and fraudulent claim in the matter of the involuntary bankruptcy of Selected Investments Corporation and Selected Investments Trust Fund; told Hendrick that Petitioner had violated numerous laws and Petitioner should be indicted and prosecuted; furnished Hendrick with a folio of evidential and summary materials allegedly indicating Petitioner's guilt. Petitioner's prosecution was thus initiated by Respondent, not as a judge, but as a private citizen through Hendrick, as part of a scheme, with Hendrick being supplied unlawfully by Respondent with alleged evidence and law pointing to and indicating specific violations of law by Petitioner (Petition p. 2).

B. *Acts Directed Against Petitioner by Judge Chandler Before The Grand Jury.*

The Grand Jury was in the charge of Judge Fred Daugherty (Petition p. 3, 4, 5).

When Judge Chandler learned on November 9 that the Grand Jury had completed its business without returning an indictment against Petitioner, he took matters in his own hands. At 1:30 p.m. November 9, 1961 Respondent pounded on the door of the Grand Jury room on the sixth floor of the Court House and demanded and gained entrance to the Grand Jury room although he was dressed in street clothes and although his entrance to the Grand Jury room was first denied by the United States Marshal who was on guard to prevent invasion of the sanctity of the Grand Jury proceedings. Respondent did not appear before the Grand Jury as a witness called and placed under oath at the Grand Jury's request. Respondent well knew at the time that his acts were unlawful and illegal; that he was not clothed with privilege; that he was wholly without jurisdiction, authority, or color of authority; and that he stood in the same position as any other stranger, outsider, or unauthorized person and was illegally and unlawfully in the Grand Jury room. *Respondent went further than to call the attention of the Grand Jury to the desirability of inquiring into alleged violations of law.* Instead he singled out O'Bryan by name and immediately went into details of O'Bryan's alleged crime in connection with the Selected Investments Corporation case. (Petition pp. 5-7)

The extraordinary character of Judge Chandler's unsworn statements can be shown only by quoting them verbatim:

"Judge Chandler: (to the Grand Jury) All right. I am glad to do what I can to help you.

"And I might say at the outset, in January or February when you all came up I talked to Mr. Hendricks. He brought the Instructions and wanted a copy of them after I had given them. *And I told him*—explained it to him, and I just—I discussed with him in the—in a cursory way, just a few words, the fact *that Mr. O'Bryan had not been prosecuted, and that a great many citizens were disturbed about it after having read it in the paper.* And recently—I may have in the meantime talked to him, I don't know. I have known him for a great many years. And I—I would say maybe on two occasions I discussed it with him. That was—one was two or three weeks ago, and—in which he interrogated me about it, and—as to what the rights of the Grand Jury were and so forth. And he had studied these Instructions I had given him. I am going to read them over to you again because they in effect state what I said to him. And the—this is the effect of what I said, and certainly not in this great detail, but I could have done this the other day or in February when you were here when I was instructing you, it is proper to, and, *really*, an old custom if the Judge does go into it.

"But, we had a case here which I spent about two years on, *Selected Investments case. I am sure you are all familiar with that case.* And the—In connection with that case Mr. O'Bryan filed a claim for over a million dollars for attorney's fees. And the Trustee took issue with it. And the—And I might say, everything I am saying is a matter of public record, as I told Mr. Hendricks when he asked me. The Trustee took issue with him and had a Hearing on it. And at the Hearing—Mr. O'Bryan had filed a claim for that amount of money, said it was an oral claim. And then about two months

later he amended it and said he had a written contract for ten per cent. And then after that the Hearing was held. The Trustee denied that the claim was good. The Hearing was held, and at that Hearing after Mr. O'Bryan had testified about the written contract the Trustee introduced into evidence the fact that the letter bore the date of October 29, 1954, and that the stationary wasn't printed until late 1955, and had his son's name on it as one of the lawyers, who was still in Law School at the same time. Mr. O'Bryan was examined about that, and theretofore been examined, by Deposition in which he stated that the contract was made in writing on or about that date, each time it would vary a little, but that he did have that contract at that time. There was a great deal of other evidence which pointed to the fact that—would cause one to doubt that, along with the fact that the first claim had—that had been filed said he had an oral claim. So, at that Hearing the Trustee, through his attorneys, introduced into evidence the plates of the Engraver, which showed that it could not have been printed on about that time, because the stationary wasn't in existence. At that time Mr. O'Bryan was represented by his son Howard O'Bryan, who is also a lawyer. And I suggested to the young man that under the circumstances—he asked for time to get further evidence—that under the circumstances the—his father—it was a serious matter and his father needed a good lawyer and not his son, who was a young lawyer, but because the matter was serious, and, in the state of the record, as it then existed, it would be the duty of the Court to find that the letter was fabricated; that there was no such contract, and that at that time—And also, I think the record shows *I stated, it seemed to me there was—he—it—it would constitute a violation of several criminal laws, and that it being so serious*, his father should get a experienced lawyer. And I continued the matter for a few days to give him that chance. And I did continue it for one week, at which time Mr. O'Bryan had obtained ex-

perienced counsel of good reputation. And in the state of the record—His counsel stated that he desired not to offer any evidence. And the Court found that the contract was fraudulent and denied the claim against the estate, and also entered Judgement against Mr. O'Bryan for $5,000.00, return of some cash that he had had right before the Trustee was appointed, and right before it came in this Court. That $5,000.00 was paid immediately with—simultaneously with the signing of the Journal Entry, which did not make Findings, at the request of Mr. O'Bryan's lawyer, as to the acts, but just denied the claim. *And at the same time I disbarred Mr. O'Bryan from practicing in this Court any further for conduct unbecoming of a lawyer.* And my two Associates joined with me in disbarring him from this court.

"Now, the fact is, in that regard, it's hard to know what my duty is. All I want to do is to perform my duty, but I do have the duty still in that civil case, it's still open, and the evidence showed that there were one hundred and fifty one thousand dollar bills given to someone by Mr. Carroll, the head of this firm. And I might say, that the contract was proved—Which contract?—the contract that the Court found to be fabricated and fraudulent was proved by Mr. Carroll also. And this Court still has the duty—and the case is still open for the purpose of finding those assets. That is being worked on continually by counsel and others, to undertake to do that, to carry out our duty in that regard.

"Now, with reference to a criminal case. Criminal matters are handled, *the question of filing them is handled by a different department of government than mine, the Executive Department. We are the Judicial Department. However, the Grand Jury is a function of the Judicial Department.* And a Grand Jury is called and instructed by the Judge as I'll read you in a moment.

"Now, the—In my statements to Mr. Hendricks I stated to him that I—I had no right to suggest or ask

—And I don't feel that way about it. As I feel about the Executive Department, it's their business what they do, as is our's in the Judiciary what we do. And it's the Grand Jury's duty under the law as I gave it to you to keep your consciences clear, as the Court has to do, we all have to do. In this connection I never suggested that anybody should be Indicted. You have the right to look into it. This Court has the right, and has always had, since the adoption of the Constitution of the United States, to call for—call to the attention of a Grand Jury the crimes that may have been committed, and point out any that he thinks it would be well to investigate. In the interrogations and discussions with Mr. Hendricks—And I'm sure that all of the discussions together have not—about this matter, have not taken ten minutes, would be my guess about it. And the—of course, I know Mr. Hendricks, and I know what he would consider to be his duty. I know that he could not be pressured into doing anything. Neither could this Court, because I am sure he knows, and I know, that all we have to do is do our duty and then we are through. Now, in connection with this case I have done my duty. I called the matter to the attention of Mr. Hendricks when he—in going over these Instructions with him. I don't—*I'm not certain that I'm the—right that I called it first, but he asked me questions. And there has been publicity, and there was publicity recently about it. The State Bar recommended disbarment. And it has been pending in the Supreme Court now,* and I imagine will be decided ultimately there. Cases don't go as fast there as they go here. The—*However, in the meantime Mr. O'Bryan is practicing law.* And he is a Certified Public Accountant, and authorized to practice before the Tax Department, U. S. Treasury Department. *At the time I disbarred him I stated that would be my duty to notify the Oklahoma Bar Association for whatever action they cared to take.* I did so. In which I stated in the letter that I was calling a matter to their attention that transpired in the Court, and

that Mr. O'Bryan had been disbarred from this Court. And I felt it my duty to call their attention to the matter and referred them to the records of his Court. I also did the same thing with the Treasury Department, because it was my duty to do so. And, incidentally, I might say, that Mr. O'Bryan had—And I certainly took no offense at it—sued me for one million and a half dollars for writing that letter, and said that I had written a letter—the letter attached to the Complaint was not the letter I had written. But when the Bar Association produced the letter the case was dismissed. And if I could—And I could only be flattered by being sued for a million dollars and a half. And I certainly have no—no personal interest in this. I have no malice, I have no feeling whatever, except that as a Judge of this Court, and I have been here eighteen and a half years, and I have practiced law twenty-one, and I know the obligations of lawyers and judges. As a Judge of this Court I know what my obligation is. I have performed it as long as I have been a Judge, and I expect to continue to do so without fear or favor of any kind. *And I don't care whether you hear this evidence. Whether you Indict this man or don't Indict him makes no difference to me,* because when I called the matter to your attention my obligation to my country and my God is fulfilled. And the—I am sure that in every statement I made to Mr. Hendricks that was implicit, and openly stated that, "It doesn't make any difference to me." I have—do have the obligation however, of proceeding in the civil case with hearings which will develop evidence. *Unfortunately Mr. Fellers, who handled this tax case in my court, is out of town and won't be here for a week or so. And I would—He has information about this. He handled it from its inception.* Judge Bohanon of this Court, is now a Judge of it, handled it, as the record will show in this case. And I am sure the District Attorney will produce anything you want him to. And I—And the District Attorney advised me about a week ago that Mr. Hendricks had written him and

asked him about this case and that he had written Mr. Hendricks. I don't know what he said to Mr. Hendricks. And when he got that letter Mr. Hendricks called me and wanted to know if I could give the benefit of any information. At the time Mr. Potter talked to me I immediately had my Law Clerk go to work on this case and get all the facts, and I—because I was familiar with it, and so were the lawyers, for many years. And you can't learn a thing of this many facets in a day. And I had her take the record, and she was here all during those proceedings, and make a list of the facts, just —just the—of where the facts were and generally what they stated. I told Mr. Hendricks I was sure the District Attorney would give him the transcripts so that you all could see the actual transcripts, and that I didn't have them, that my Law Clerk had delivered them to the District Attorney with the Index or Chronological Statement of events, a copy of which I had that he could have if he wanted it; and that I would send it to him. *In the press of business I forgot to, and thought of it on Sunday and took it by his house and left it there with his wife to give to him to look it up and give it to him. I don't know whether he still has it or not, because—I am sure he does, because he asked me if it would be all right to take it to the Jury Room, and I said "Of course. They are entitled to know anything that you know."*

"Now, I would like in connection with what I consider my duty, and I nearly did it the other day, I think it does us all good. This is short and it will take four or five minutes to read. And I'd like to read it to you. And all I've been saying to you is contained right in these Instructions here. And I might say also that in connection with this case I did, to be sure that I'd tell everything, and in the event I haven't Mr. Hendricks, would you call it to my attention, that I told Mr. Hendricks that he was entitled to have a Court Reporter to take down everything that was said, and that I had designated the Official Court Reporter, mine, and

that he is entitled to have him if he wanted to, and that the—this function was such that the Reporter should be from the Judicial Department and not anyone designated by the Department of Justice because there is that division of powers under our form of government.

"I want to read these to you.

"MR. HENDRICKS: Would you forgive me, Judge?

CHANDLER:" Yes.

"MR. HENDRICKS: *Since you referred to having left at my home a transcript of certain documents, I call to your attention that that was returned to your Law Clerk on Monday. I did keep and photographed a copy of the original of the items involved.*

CHANDLER:" That's right. And I don't know what was—What was with that?

"MR. HENDRICKS: It was a—transcripts, copies of —copies of transcripts taken from the testimony at the—

CHANDLER:" Yes; from the records of this Court.

"MR. HENDRICKS: That's right; from the records. And it was no personal memorandum or—

CHANDLER:" There was no statement in there by me or any other—other person, except the records of this Court.

"MR. HENDRICKS: It was—It was photographic copies of transcripts of the evidence taken in the record, which I studied that night and the next day, and returned them to your Law Clerk. I feel that both Mr. Potter and everybody should know that, since my name is here. Then may I also—

CHANDLER:" I thought you kept it all. Whatever you have Mr. Potter has, because it is a copy of what we gave to Mr. Potter.

"MR. HENDRICKS: I simply to—simply wanted the mind of these jurors to be clear, sir, and to know

that the only thing I retained is a photographic copy of the chronological order.

CHANDLER:" But there were some transcripts that I had left attached to that.

"MR. HENDRICKS: There were considerable transcripts attached to that, including the original of this (Indicating). All of which was returned to your Law Clerk. Now, may I ask one other question if I may at this point?

CHANDLER:" You may.

"MR. HENDRICKS: We were discussing at the time of your entrance, and was about to hear a statement from Mr. Potter on this matter of, "Reporter."

CHANDLER:" Yes?

"MR. HENDRICKS: It's not my intention to interfere. All I want is, I feel it's of such importance that the record should be kept, and if necessary, transcribed, because this apparently is getting to be in such a nature of extremely important matter, and in fairness to all concerned, including the Bench and Bar, this Grand Jury, that such should be preserved." (Petition, Appendix pp. ii-x) (Emphasis supplied)

Respondent also schemed and contrived to alter and change the official transcript of his statements to the Grand Jury in order to cover up the illegal nature of his acts committed before the Grand Jury (Petition p. 12).

C. Acts of Respondent on Appeal of This Case

On August 18, 1965, the day this cause was orally submitted to the Circuit Court of Appeals at Denver, Respondent filed a document labeled "Official Statement of Judge Chandler" (Supplementary Transcript of Record p. ..... in-

corporates this document [printed with blue cover] by reference.) Petitioner filed Motion to Strike this document on the basis that the document was not a proper brief but was an unsworn document containing defamatory and scandalous accusations against Petitioner; that under the rules of the Court below the time for filing briefs had been set and was known to Respondent; that Respondent was wholly in default in filing the document on the day of oral argument; that under the rules of the Court below, both the request of the Court and consent of Petitioner were required to excuse the default, and that no request of the Court or consent of Petitioner was obtained (Supplementary Transcript of Record p. .....). The Court below denied Petitioner's Motion to Strike (Supplementary Transcript of Record p. .....).

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted to Determine Whether the Doctrine Of Judicial Immunity Should Be Extended To Protect Respondent, A Federal District Judge, Who Violated Federal Criminal Statutes By Corruptly Influencing The Grand Jury To Return An Indictment Against Petitioner.

The mantle of judicial immunity covers acts of Respondent unless there is a "clear absence of all jurisdiction over the subject matter." *Bradley v. Fisher*, 13 Wall 335 (1871) at p. 351. The acts committed by Respondent in his determination to indict and imprison Petitioner were in direct violation of federal criminal statutes. This Honorable Court

should grant this writ to examine this important legal proposition: Were Respondent's criminal acts in clear absence of all jurisdiction over the subject matter?

Respondent was guilty of violating Sec. 1503, Title 18, U.S.C.A. captioned: "Influencing or Injuring Officer, Jury, or Witness Generally" by intentionally invading the secret deliberations of the Grand Jury and delivering his lengthy unsworn statement against Petitioner. His unsworn statement, delivered behind the facade of a federal judge, contained heresy, insinuations, fabrications, and half-truths. His patent purpose and intention was to influence the Grand Jury to return an indictment against Petitioner after all his other attempts had failed.

Sec. 1503 provides:

> "*Whoever* corruptly * * * endeavors to influence * * * any grand or petit juror in or of any court in the United States, * * * in the discharge of his duty, * * * or corruptly * * * or by * * * communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impedes, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years or both."

The statute covers all persons. It does not exclude judges.

It is difficult to imagine a more flagrant violation of this criminal statute. The influence on the Grand Jury was intensified in its corruption by Respondent playing the role of a federal judge representing justice and impartiality.

Respondent's meetings with the Grand Jury foreman at the foreman's home prior to the Grand Jury session and

Respondent's actions before the Grand Jury were corrupt "endeavors to influence" a grand juror and the Grand Jury of a court of the United States in the discharge of duties and were corrupt "endeavors to influence" the due administration of justice.

Respondent was also in violation of Sec. 1504, Title 18, U.S.C.A. by submitting written communications to the Grand Jury foreman at the foreman's home.

Sec. 1504 states:

> "Influencing Juror by Writing. *Whoever* attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties by *writing or sending to him any written communication*, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both." (Emphasis supplied.)

Respondent's purpose in submitting these written communications to the Grand Jury foreman was to influence the foreman's action and decision concerning Petitioner before the Grand Jury.

Respondent is also guilty of violating Secs. 2073 and 2074, Title 18, U.S.C.A. by causing the official transcript of his statements to the Grand Jury to be altered and changed in an attempt to prevent exposure of his illegal acts before the Grand Jury (Petition p. 12).

It is submitted that Respondent's acts in direct violation of federal criminal statutes were in "clear absence of all

jurisdiction." There is no necessity nor any public policy reasons to extend the doctrine of judicial immunity to protect this Respondent from the legal consequences of his criminal acts. Because of the extraordinary character of Respondents actions there are no cases directly in point. Authority for Petitioners position is found in *Manning v. Ketcham*, 58 F. 2d 948 (6th Cir. 1932); *Walker v. U. S.*, 93 F. 2d 383 (8th Cir. 1937); *United States v. Manton*, 102 F. 2d 834 (2nd Cir. 1938) and *Root Refining Company v. Universal Oil Products Co.*, 167 F. 2d 514 (3rd Cir. 1948).

II. The Writ Should Be Granted Because The Doctrine Of Judicial Immunity Does Not Apply To The Non-Judicial Actions of Respondent Before The Grand Jury Which Were In Clear Absence Of Jurisdiction.

Careful analysis of the basis of the decision in *Bradley v. Fisher*, 13 Wall 335 (1871), leads to the conclusion that it should not be applied to this case. *Bradley v. Fisher* held that judicial immunity protects a judge where jurisdiction over the subject matter is invested by law in the judge or in the court which he holds. In *Bradley v. Fisher* at p. 351 this Honorable Court stated:

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter [note: this refers to subject matter of the trial before the Judge who is later charged]. Where there is clearly no jurisdiction over the subject matter, *any authority exercised is a usurped authority and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.* But where jurisdiction over the

> subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other question involved in the case, although upon the correctness of his determination in these particulars is the validity of his judgment may depend." (emphasis supplied)

Respondent had no jurisdiction over the subject matter involved here. The subject matter here is the independent, impartial functioning of a Federal Grand Jury. The Grand Jury was in the charge Judge Fred Daugherty. It was not in Respondent charge. Respondent was not presiding over any case involving Petitioner. Respondent had absolutely no jurisdiction over the Grand Jury at the time he invaded its deliberations on November 9, 1961. The Grand Jury had already been given its general instructions. It was engaged in its role as an impartial, deliberative, independent body. By law it was to be kept free from corrupt influences of *any* outside person. Judge Chandler had no jurisdiction or color of jurisdiction to influence corruptly this Grand Jury. His own words prove that he knew he had no jurisdiction when he entered the Grand Jury room for he tried to manufacture jurisdiction for his action by declaring the Grand Jury Room to be a United States Court Room. But even Judge Chandler cannot manufacture his own jurisdiction; it must be invested in him by law.

The opinion below states the reason for its conclusion that there was no clear absence of jurisdiction as follows:

> "It (the Grand Jury) was an appendage to the Court over which he presided. *Brown v. United States*, 359 U.S. 41, rehearing denied 359 U.S. 976." (page 5-B infra)

But this Honorable Court did not mean by the phrase "appendage of the court" in *Brown v. United States* that the Grand Jury is a subservient body over which a district judge has jurisdiction so as to give immunity to a judge who corruptly influences the Grand Jury in its deliberations. In *Brown* on page 49 this Honorable Court said:

> "*A grand jury is clothed with great independence in many areas*, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so." (emphasis supplied)

On this basis this Honorable Court held that Brown, clothed with statutory immunity, was guilty of contempt for refusing to answer questions directed to him by the court in the presence of the grand jury. In the area depicted in Brown, the grand jury may be considered an appendage of the court for the purpose of having the contempt power of the court impartially used to aid the grand jury's investigative functions. But this Honorable Court said in *Brown* there are many areas where, "a grand jury is clothed with great independence * * *" Such areas of independence are the consideration of the testimony only of sworn witness and deliberations of such testimony free of corrupt influence from any source.

The true concept of the function and status of the grand jury in these areas has been stated by Justice Fields:

> "* * * The grand jury stands as the great inquest between the government and the people; the bulwark between enmity, hatred and ill will on the one side and justice and fair dealing between man and man on the other; a fortification that shelters the innocent against every assailant and protects the people against every crime. *Standing as a co-ordinate branch of our criminal jurisprudence,*—influence its findings by *courts, officers,* or laymen, and you pave the way to influence its deliberations by *corrupt means.* You place the entering wedge, which goes to the foundation of the liberties of the people. *If the court has the right to compel the grand jury to return an indictment after that body has refused to do so,* then that body loses its independent function, the purposes of its establishment, the confidence of the people, and should be abolished.
>
> "*The rule of law which forbids all communication with Grand Juries,* engaged in criminal investigations, *except through the public instructions of courts, and the testimony of sworn witnesses,* is a rule of safety to the community." 30 Fed. Cas. No. 18,255 at p. 955 (emphasis supplied)

Respondent's acts were in flagrant violation of these basic principles. The Grand Jury had already been given its instructions two days earlier at Judge Fred Daugherty's request. Respondent had no jurisdiction to give the Grand Jury these same instructions *anywhere* without Judge Daugherty's authority. *United States v. Heath,* 103 F. Supp. 1 (Dist. Hawaii 1952). And certainly Respondent had no jurisdiction to invade the secrecy and independence of the Grand Jury's room to corruptly influence its deliberations.

He had no more standing there than any private citizen. He was a trespasser. His actions were more reprehensible than if a private citizen had done this, for he tried to play the role of a United District Judge in order to use the influence and prestige of that honorable office on the Grand Jury. But the role he tried to play was self-contradictory to the role he actually played! A trespasser in the Grand Jury Room bent on corruptly influencing the Grand Jury to indict Petitioner.

III. The Writ Should Be Granted Because The Decision Of The Circuit Court of Appeals Is Contrary To The Law Of Conspiracy That Each Co-Conspirator Is Responsible For All Acts Done In Furtherance Of The Common Design.

The opinion below dismissed all the facts well pleaded in Petitioner's amended complaint (these facts are summarized at pages 4-8 supra) showing a conspiracy between Respondent and named private persons, with the sweeping conclusion that the only—

> "difference between the allegations in the original complaint is that those same acts complained of in the original complaint are now alleged to be the conspiracy." (page 7-B infra)

That this conclusion is not valid is apparent from reading the summary of Petitioner's conspiracy allegations. The opinion below first gives lip service to the general rule that in considering a motion to dismiss for failure of the complaint to state a cause of action "all facts well pleaded are admitted" (page 3-B infra). But then the opinion breaches

this rule by making inferences unsupported by the record favorable to Respondent and failing to come to grips with the facts well pleaded by Petitioner.

The Circuit Court's conclusion that the charge of conspiracy adds nothing to Petitioner's amended complaint is also erroneous because it is contrary to basic and fundamental principles of a conspiracy action for the following reasons:

1. Judge Chandler's co-conspirators, being private persons have no judicial immunity for their acts.

2. Each conspirator is jointly and severally liable for all damages resulting from the conspiracy. *Lewis v. Ingram*, 57 F. 2d 463 (10th Cir. 1932) Certiorari denied, 287 U.S. 614; *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690 (1877)

3. Any act done in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. *McCandless v. Furland*, 297 U.S. 140, 165 (1935).

It follows from these principles that the acts done by Judge Chandler's co-conspirators in the furtherance of the common design were acts not done under judicial immunity; that these acts became the acts of all conspirators including Judge Chandler and each conspirator, including Judge Chandler, is responsible for such acts.

The opinion below attempts to avoid the principles of the law of conspiracy (that each of the acts of the co-

conspirators in furtherance of the conspiracy are the acts and responsibility of each and all of the conspirators) by concluding all of the acts of the co-conspirators come under judicial immunity of Chandler as a federal judge and that all acts in furtherance of the conspiracy turn upon only Chandler's acts with the grand jury foreman and the appearance of Judge Chandler before the grand jury on November 9, 1961. The opinion below thus hides Petitioner's charges of conspiracy to plunder, defraud, and corrupt under the mantle of judicial immunity by ignoring the acts of the other unpriviledged conspirators and failing to charge Respondent with the responsibility for the acts of his unpriviledged co-conspirators.

Agnew v. Moody, 330 F. 2d 868 (9th Cir. 1964) cert. denied 379 U.S. 867 cited in the opinion below as authority for its decision is not at all in point for there the charge of conspiracy was against a judge and "quasijudical" officers all of whom have immunity under the Civil Rights Act for conduct in the performance of their official duties. This also was true of the acts charged against the judges in *Brictson v. Woodrough*, 164 F. 2d 107 (8th Cir. 1947). However the actual decision in *Brictson* was that the cause of action on its face was barred by a Nebraska statute of limitations. *The need is great for an authoritative decision by this Honorable Court on this important area, concerning the boundaries of federal judicial immunity where there is a conspiracy.*

IV. The Writ Should Be Granted Because The Decision Below Is In Direct Conflict With Decisions In The 3rd, 5th, 7th, and 9th Circuit Courts of Appeal Holding Rule 15 (a) F. R. Civ. p. 1, Permits A Party To Amend His Pleadings Once As A Matter Of Course At Any Time Before A Responsive Pleading Is Served.

The decision of the court below is directly in conflict with the decisions of four other Circuit Courts of Appeal holding that the proper interpretation and application of Rule 15(a), F. R. Civ. P. authorizes the filing of an amended complaint as a matter of right where no responsive pleadings have been filed. The court below concedes and lists some of the decisions in conflict in its footnote 5 (P. 6-B) infra. Additional decisions of the 5th Circuit in conflict are: *Ohio Gas Co. v. Farmers Bank*, 178 F. 2d 570, 573 (5th Cir. 1949); *Case v. State Farm Mutual Ins. Co.*, 294 F. 2d 676 (5th Cir. 1961).

The decision below is flatly contrary to the express words of Rule 15 (a) which reads:

> "(a) Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served * * *"

The result of the decision below has not only denied Petitioner a jury trial but also has even denied him the right to have the merits of the pleadings of the parties tested in pre-trial. *Respondent has yet to file a responsive pleading or swear to any fact. Petitioner has been denied the right to any sort of trial or hearing on the merits.*

This Honorable Court is urged to resolve this conflict in favor of the decisions in the 3rd, 5th, 7th, and 9th Circuits on the basis stated in *Conley v. Gibson*, 335 U.S. 41, 48 (1957).

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle *that the purpose of pleading is to facilitate a proper decision on the merits.*" (emphasis supplied)

Furthermore, the record shows beyond question that the trial court refused to look at, much less consider, the merits of Petitioner's amended complaint. (R. 93-95). So, even if Rule 15(a) be interpreted to place permission to file an amended complaint (before a responsive pleading is served) within the discretion of the trial court, there was a clear abuse of discretion here. The trial court has a mandate to exercise discretion and to allow amendments freely. *Forman v. Davis*, 371 U.S. 178 (1962). A failure to exercise any discretion is an abuse of discretion. A failure to consider the merits of an amended complaint or as here, refusal to look at the amended complaint, is an abuse of discretion. Instead of affording Petitioner his rightful opportunity for a consideration of his case on the merits, he has been, in effect, barred at the courthouse house. This is contrary to this Honorable Court's pronouncement in *Forman v. Davis* supra at page 182, "* * * But outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of this discretion and inconsistent with the spirit of the Federal Rules."

V. The Writ Should be Granted To Determine Whether The Holdings Below Together With Permitting Respondent's Defiance Of And Refusal To Follow The Rules Of Law Amount To A Sovereign Immunity Beyond The Limits Of Judicial Immunity.

Up to this point Petitioner has been denied his right to a trial on the merits. Respondent and his co-conspirators have ruined Petitioner's reputation, caused him to suffer great mental anguish and physical deterioration, and have practically ruined his established professional practice and earnings. Despite all this, Petitioner has been blocked in all efforts to get a fair test of the facts. This is because Respondent behind the shield of his powerful office of a federal judge, operates in the manner of a sovereign rather than a judge. His methods are in disregard of and in breach of the rules of law as it is applied to all others. Such arrogant methods are a major cause of the Judicial Council's action against him.

The undisputed facts concerning Respondent's manipulations of the Grand Jury are an exhibition of Respondent's methods of trampling on and ignoring the laws of the land. Such are his methods in almost every move he makes. A typical example is the way he injected his so-called "Official Statement" into this suit. (This document is printed [with blue cover] and will be referred to as "Statement") He did not file the "Statement" until the day of oral submission of this case to the Circuit Court of Appeals, contrary to the

rules. Also he filed it after he furnished the contents of the "Statement" to the news media causing it to be published to the world in violation of Canon 20 Canons of Professional and Judicial Ethics.

The unsworn "Statement" has no legal basis in this suit. It contains 25 pages of allegations all of which are outside any record in this case. Not one of the allegations is documented to the Transcript of Record. The manner of its writing and its filing and the nature of its contents show that Respondent considers himself bound by no rules of law. Its purpose is to poison the minds of readers against Petitioner. Respondent evades a trial on the merits, subject to oath and cross examination. Instead Respondent uses the "Statement" as a means to "try" Petitioner. Of course Respondent finds Petitioner guilty on all counts and finds that Petitioner's conduct (for daring to resist Respondent) is a flagrant violation of all legal, ethical, and moral standards. Respondent then charges that Petitioner's lawsuit against Respondent "is an inexcusable AGGRAVATION of that misconduct" *and therefore Petitioner should be summarily held in contempt and punished.!* ("Statement" p. 23).

Respondent accuses Petitioner of being an accomplice if not the master mind behind the bribery of certain justices of the Supreme Court of Oklahoma. ("Statement" p. 18). Respondent insists that the indictment returned against Petitioner by the Grand Jury was valid even though the

It is seen that Respondent acts as though he has the powers and immunities of a soverign and assumes jurisdiction to act beyond the limits of jurisdiction of a federal judge.

Respondent states he has the *right* to ignore the normal legal procedure to appear as a witness before a grand jury; be sworn and give testimony. Respondent insists that he may at his discretion go to the grand jury in closed session; detail the facts to the grand jury, and the

> "Grand Jury can very properly, relying ONLY upon the statements of the judge, whose words are always sanctified by his official oath as judge, sanctity greater than any simple oath to tell the whole truth, return a VALID indictment SOLELY upon such presentation." ("Statement" p. 22)

And Respondent insists he had and still has the power himself to summarily punish Petitioner with imprisonment in a manner that appears to be in the nature of star chamber proceedings, *he makes the threat to do so.* ("Statement" p. 21, 23)

CONCLUSION

Federal judicial immunity is court created. Our Constitution did not grant immunity to judges as it did to congressmen in Article I, Section 6. And *Bradley v. Fisher* placed limits on judicial immunity. Those limits have been violated by Judge Chandler. Petitioner is entitled to his day in a court of justice for a fair hearing on the merits. Judicial immunity is not sovereign immunity. Judge Chandler must be account-

able to some authority for his corrupt misdeeds. For all the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

REAGAN M. MARTIN,
HARLAN GRIMES,
W. H. PAT O'BRYAN, *Pro se*,
HARVEY L. DAVIS.

APPENDIX A

Title 18, § 1503. Influencing or injuring officers, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence. intimidate or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

§ 1504. Influencing juror by writing

Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both.

Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury. June 25, 1948, c. 645, 62 Stat. 770.

Title 18, Section 2071. CONCEALMENT, REMOVAL, OR MUTILATION GENERALLY

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or

both; and shall forfeit his office and be disqualified from holding any office under the United States. June 25, 1948, c. 645, 62 Stat. 795.

Section 2073. FALSE ENTRIES AND REPORTS OF MONEYS OR SECURITIES.

Whoever, being an officer, clerk, agent, or other employee of the United States or any of its agencies, charged with the duty of keeping accounts or records of any kind, with intent to deceive, mislead, injure, or defraud, makes in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties; or

Whoever, being a officer, clerk, agent, or other employee of the United States or any of its agencies, charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust for any person any moneys or securities, with like intent, makes a false report of such moneys or securities—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 795.

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APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7907—November Term, 1965

W. H. PAT O'BRYAN,

Appellant,

v.

STEPHEN S. CHANDLER,

Appellee.

Appeal From The
United States District Court
For The Western District Of Oklahoma.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and PICKETT, Circuit Judge.

W. H. Pat O'Bryan, an Oklahoma attorney and Certified Public Accountant, instituted this action against Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to recover damages, actual and punitive, for alleged malicious prosecution, libel and slander,[1] arising out of certain activities of Judge Chandler before a grand jury, which resulted in a criminal indictment against O'Bryan. This is an appeal from an order

[1] The action was brought in the District Court of Oklahoma City, Oklahoma, and timely removed to the United States District Court for the Western District of Oklahoma upon petition of Judge Chandler, under the provisions of 28 U.S.C. §1442.

dismissing the complaint on the grounds that the alleged misconduct of Judge Chandler was not clearly in the absence of his jurisdiction as a Judge, and that he therefore was judicially immune from civil liability.

It is settled doctrine that a Judge is not liable in damages for acts performed in a judicial capacity unless there is a "clear absence of all jurisdiction" over the subject matter. This is true, even though the Judge's acts are in excess of his jurisdiction and done maliciously, corruptly, or arbitrarily. Bradley v. Fisher, 13 Wall 335. This court, in Ryan v. Scoggin, 245 F. 2d 54, 58 announced the rules in these words:

> "It is a principle of universal acceptation in its relation to judges at all levels that a judge is not liable in damages resulting from an order entered or a judgment rendered in an action or proceeding over which the court has jurisdiction of the subject matter and of the parties, even though such order or judgment is in excess of the vested jurisdiction, or is otherwise erroneous and is set aside or reversed on appeal or other review. That deep-seated fundamental rule of ancient origin and frequent repetition rests upon considerations of public policy that such immunity is a concomitant of an independent judiciary which is indispensable to the well-being of a free people. * * * (Citing cases). It is only in instances in which a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act. * * * "

See, also, Barr v. Mateo, 360 U.S. 564; Gregoire v. Biddle, 2 Cir., 177 F. 2d 579, cert. denied 339 U.S. 949; Brictson v.

Woodrough, 8 Cir., 164 F. 2d 107[2], cert. denied 334 U.S. 849.

It is, of course, the general rule that in considering a motion to dismiss for failure of the complaint to state a cause of action, that all facts well pleaded are admitted. Ryan v. Scoggin, supra. The material allegations of the complaint, and exhibits attached thereto, show that O'Bryan had filed a claim for more than one million dollars in a bankruptcy proceeding known as the "Selected Investments case[3]", then pending in Judge Chandler's court. At a hearing in the bankruptcy proceedings, O'Bryan first supported the claim with oral testimony; he later produced a letter contract in support of his claim. The court found the claim to be fraudulent, disallowed it, and required O'Bryan to return $5,000 to the Trustee in Bankruptcy. O'Bryan was thereupon disbarred from the practice of law in the United States District Court for the Western District of Oklahoma. The Judge was convinced that the letter contract had been fabricated, that the claim was fraudulent, and that O'Bryan had committed perjury in his attempt to sustain it.

On November 7, 1961 a grand jury was convened in the Western District of Oklahoma where it was qualified by

[2] The Brictson case was heard in the 8th circuit before a panel of judges from the 10th circuit, sitting by assignment.

[3] Matters involving the Selected Investments Corporation bankruptcy proceedings have been before this court in a number of cases. Carey v. Selected Investments Corp., 10 Cir., 319 F. 2d 578; Burns v. United States, 10 Cir., 286 F. 2d 152; Workman v. Harrison, Trustee, 10 Cir., 282 F. 2d 693; Selected Investments Corp. v. Duncan, 10 Cir., 260 F. 2d 918, dert. denied 359 U.S. 914.

Judge Chandler and given the usual general instructions as to its duties.

It is alleged that when the grand jury had completed consideration of the cases to be presented by the United States District Attorney, Judge Chandler, after having consulted privately with the foreman of the grand jury concerning the O'Bryan matter, appeared personally in the grand jury room at the request of the foreman. Judge Chandler first announced that the room was "a United States Court Room now instead of a Grand Jury Room, to keep you all from having to come upstairs." He advised the grand jury that he was there at the request of the foreman to explain the original instructions and to answer questions submitted by members of the grand jury, and he said that when he left "you can reform as to the Grand Jury." Thereupon the grand jury foreman requested that the Judge furnish certain information which he had concerning O'Bryan's transactions in the Selected Investments Corporation matter. The O'Bryan claim was then explained in detail, including the reasons for its disallowance. The Judge explained that he was not suggesting that any indictment be returned, but that it was his duty to direct the attention of the grand jury to possible violations of criminal laws for investigation. The original instructions were reiterated, and the United States Attorney advised the grand jury that his office stood ready to produce any information that it desired. Thereafter a 2-count indictment was returned charging O'Bryan with making a false claim in a bankruptcy proceeding and with concealing assets from a

trustee in bankruptcy, in violation of 18 U.S.C. §152. On September 28, 1962, Judge Fred Daugherty of the United States District Court for the Western District of Oklahoma, dismissed the indictment without prejudice, upon the ground that Judge Chandler's activities in the presentation to the grand jury of the O'Bryan matter was a "technical irregularity" which invalidated the indictment.

We cannot agree with O'Bryan's contentions that Judge Chandler's conduct was clearly in absence of any jurisdiction and that his acts were those of a private individual. While it appears that the Judge's method of suggesting that the grand jury investigate the O'Bryan matter may have been unusual, irregular, or even erroneous, there nevertheless was no clear absence of jurisdiction. The grand jury was regularly convened in the United States District Court for the Western District of Oklahoma, of which Judge Chandler was the Chief Judge. Acting in that capacity, he had qualified the grand jury, designated its foreman and deputy foreman, and submitted to it the usual instructions. It was an appendage to the court over which he presided. Brown v. United States, 359 U.S. 41, rehearing denied 359 U.S. 976. The O'Bryan claim had been heard by Judge Chandler in a proceeding pending in his court; that he strongly suspected irregularity in the filing of that claim is understandable. The propriety of his expressions of opinion as to O'Bryan's guilt is questionable; still, the Judge had the power and jurisdiction not only to call attention to what he thought was a violation of the law, but also to direct that available evidence be presented to the grand jury. Arbor v. Blue, 10 Cir., 45 F. 2d 746.

After entry of the judgment dismissing the complaint, O'Bryan sought leave to file an amended complaint. The court refused to permit the pleading to be filed. It is contended here that no responsive pleading had been filed, and that Rule 15(a) F.R.Civ.P. authorized the filing as a matter of right[4]. While there are decisions to the contrary[5], this court has held that the right to amend without leave of the court ends "with the entry of a judgment dismissing the action" and the filing of amended pleadings thereafter is addressed to the sound discretion of the court. Feddersen Motors v. Ward, 180 F. 2d 519. Accord: Swan v. Board of Higher Education of the City of New York, 2 Cir., 319 F. 2d 56.

The prolix document submitted by O'Bryan as an amended complaint covers twenty pages of the printed record, much of which is completely extraneous matter interposed with scandalous and scurrilous statements. It is an attempt to state a cause of action based upon an alleged conspiracy entered into between Judge Chandler and ten other persons. These ten additional individuals are named as defendants without an order of the court. It appears from the amended complaint that the purpose of the so-called "con-

[4] Rule 15(a), F.R. Civ. P. provides:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *"

[5] Breier v. Northern Calif. Bowling Proprietors' Ass'n, 9 Cir., 316 F. 2d 787; Fuhrer v. Fuhrer, 7 Cir., 292 F. 2d 140; Peterson Steels v. Seidmon, 7 Cir., 188 F. 2d 193; Kelly v. Delaware River Joint Comm'n, 3 Cir., 187 F. 2d 93, cert. denied 342 U.S. 812.

spiracy" was to effect a disallowance by Judge Chandler of O'Bryan's claim in the bankruptcy proceeding herein mentioned, and to cause a criminal indictment to be returned against him. The only substantive difference between the allegations in the original complaint and those in the proposed amended complaint is that those same acts complained of in the original complaint are now alleged to be the product of the conspiracy. The proposed amended complaint states that the acts of Judge Chandler were "wrongfully, willfully, knowingly, purposely, designedly, fraudulently, maliciously, oppressively and corruptly" performed. There are the same acts for which we have heretofore said Judge Chandler could not be held liable in damages. As the trial Judge states, "* * * the acts of defendant [Chandler] of which plaintiff complains are the defendant's private meetings and conversations with the foreman of the grand jury in order to induce the foreman to initiate an investigation of the plaintiff, and the defendant's invasion of the grand jury room and the accusation of the plaintiff that the defendant there made." This is the gravamen of the original complaint as well as the tendered amended complaint. Allegations that the acts of Judge Chandler were part of a conspiracy would not be sufficient to state a claim upon which relief could be granted if the claim is otherwise barred by the doctrine of judicial immunity. Agnew v. Moody, 9 Cir., 330 F. 2d 868, cert. denied 379 U.S. 867; Brictson v. Woodrough, supra. We find no abuse of discretion of the trial Judge in refusing to permit the filing of the amended complaint.

AFFIRMED.

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APPENDIX C

O'Bryan vs. Chandler

377-1] Harper, Judge

Memorandum Opinion And Order

W. H. Pat O'Bryan, hereinafter referred to as plaintiff, filed suit on September 25, 1963, against the defendant, a United States District Judge for the Western District of Oklahoma, in the District Court of Oklahoma County, State of Oklahoma. The plaintiff's cause of action is in two counts. The first count seeks damages for malicious prosecution, libel and slander in the amount of $5,000,000.00 and the second count seeks an additional $5,000,000.00 as punitive damages. The suit was filed by the plaintiff after a criminal indictment which had been returned against the plaintiff by the grand jury in the Western District of Oklahoma had been dismissed.

The case was duly removed to the Federal Court and the plaintiff's motion to remand overruled. The case is now before the court on defendant's motions to strike, to state separately, and to dismiss, all having been presented to the court by very exhaustive briefs and lengthy oral argument. The court in this memorandum opinion and order will concern itself only with the defendant's motion to dismiss for failure to state a cause of action.

377-2] Cases are legion wherein the appellate courts have dealt with the problem of attempts to terminate litigation believed to be without merit by dismissing a complaint for failure to state a cause of action, and the appellate courts

generally agree that in order to justify such a dismissal by the trial court it must appear as a matter of law that under no state of facts which the plaintiff could prove in support of the claims pleaded would he be entitled to any relief. The Supreme Court in Conley v. Gibson, 355 U.S. 41, 45-46, said:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

And so, with respect to the motion to dismiss we must examine the plaintiff's petition and consider it in the light of this accepted rule, but before doing so we must turn to the law with respect to the civil liability of judges in order to evaluate the petition under the accepted rule of law. The law has long been well settled that judges are exempt from civil liability for acts done by them in the exercise of their judicial function. Many, many decisions to this effect pertaining to judges and other public officials are reported. One of the early decisions of the Supreme Court, Bradley v. Fisher, 13 Wall 335, 357; 2 Law Ed. 646; discusses the matter in great detail. This case has repeatedly been cited by the courts and we, therefore, turn to it for guidance. At page 651 the court had this to say:

377-3] "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A dis-

tinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. * * * * But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him." * * * *

And then, further:

"The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject-matter, though ir-

regularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigations upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

377-4] As expressed in the Bradley case, a judge is exempt from civil liability even when he acts in excess of his jurisdiction and such acts are done maliciously and with bad motives. The United States Supreme Court has expressed the policy that only when there is a clear absence of all jurisdiction over the subject matter can a judge be held civilly liable. The court in Bradley v. Fisher distinguished between a judge acting in excess of jurisdiction and a judge acting in clear absence of all jurisdiction. Only in the latter situation is a judge's authority considered usurped authority.

A recent United States Supreme Court opinion weighs the two conflicting considerations or policies which confront

the court in this case. The conflicting policies are, on the one hand, "the *protection of the individual* against pecuniary damage caused by aggressive or malicious action on the part of officials of the Federal Government;" and on the other, "the *protection of the public* interest by shielding responsible government officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." (Emphasis added.) Barr v. Matteo 360 U.S. 564, 565 (1959). The Supreme Court cited Bradley v. Fisher, supra, as controlling law, and quoted from an opinion written by the late Judge Learned Hand, as follows:

" 'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable.

377-5] danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public

officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation....

"'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him....' Gregoire v. Biddle, 177 F. 2d 579, 581.

As stated by Judge Hand and quoted as controlling by the Supreme Court, public policy dictates that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Barr v. Matteo, supra, 1.c.572.

This court must now apply the law, as clearly set forth by the United States Supreme Court, to this case.

377-6] The court recognizes that there have been situations in the past which have warranted a judge being held civilly liable (see Manning v. Ketcham, 58 F. 2d 948 (1932)). In that case the judge was found to have no authority to act officially over the subject matter at hand. There was a clear absence of all jurisdiction. That case fits neatly into the test set forth by the Supreme Court back in 1872 (Bradley v. Fisher, supra). The test to be applied is that if there is a clear absence of all jurisdiction then a judge can be held civilly liable, otherwise he cannot be held civilly liable.

And so in this action with respect to this motion we must examine the plaintiff's petition to determine if the plantiff can prove a set of facts in support of his claim which would entitle him to relief under the test we have just set forth. Attached to the plaintiff's petition and made a part thereof are four exhibits, Exhibit A being a copy of the transcript of the remarks of the defendant Chandler to the grand jury, Exhibit B being a copy of an indictment returned by the grand jury on November 10, 1961, in the United States District Court for the Western District of Oklahoma against the plaintiff, Exhibit C being a copy of a brief of the United States Attorney for the Western District of Oklahoma which was handed to Judge Daugherty of said court, and Exhibit D being a copy of an order entered by Judge Daugherty in the criminal case against the plaintiff dismissing the case without prejudice.

377-7] We must, therefore, consider not only the petition, but the exhibits attached thereto. A careful examination of the petition discloses many things alleged which pertain only to maliciousness and ill-will on the part of the defendant toward the plaintiff, and are of no consequence in weighing the petition with respect to the above rule, since such allegations apply only to Count 2 of the indictment regarding punitive damages. The plaintiff in arguing the motion to the court stated that Exhibit A attached to the petition correctly sets forth what occurred before the grand jury on the day preceding the indictment, and so nothing could be accomplished in this instance to grant to the plaintiff the right to file amended pleadings, since the basis of his complaint is Judge Chandler's remarks to the grand jury on November 9th. As a matter of fact, the plaintiff in his brief filed with the court on November 6, 1963, in support of his motion to remand, set out in some detail an analysis of the allegations of the petition, and following such characterization of the petition, at page 11, had this to say:

"Reduced to even more simple terms, the acts of defendant of which plaintiff complains are the defendant's private meetings and conversations with the foreman of the grand jury in order to induce the foreman to initiate an investigation of the plaintiff, and the defendant's invasion of the grand jury room and the accusation of the plaintiff that the defendant there made. These are the acts about which this court must answer this question: Were these acts under the circumstances under which they were done, done in the performance of the defendant's duties as a United States District Judge?"

377-8] The position of the plaintiff at the argument on this motion was the same, which was to the effect that if the defendant's remarks before the grand jury were within the jurisdiction of the defendant as a judge the plaintiff had no cause of action. To this court this appears to be a proper position, because it was after the defendant's appearance before the grand jury that the plaintiff was indicted, which led to this suit. The other allegations set forth in plaintiff's petition deal with maliciousness and refer to acts which occurred before this time, and following those acts the grand jury had returned a number of indictments but did not return one against the plaintiff.

So the real question for the court is whether or not the plaintiff's petition based upon what occurred before the grand jury on November 9, 1961, which it is admitted by the plaintiff is completely and entirely set out in Exhibit A attached to the petition, was the proper basis for a civil action against the defendant. In other words, was this a judicial act on the part of the defendant or was there a clear absence of all jurisdiction?

The petition discloses that we are dealing with an instance which occurred in a United States district where there is more than one judge; that the defendant, one of those judges, had originally charged this grand jury, had designated the foreman and deputy foreman of the grand jury; and that on the occasion in question went to the grand jury room, constituted it a court room and delivered the remarks here complained of. We must realize that a grand jury has no existence aside from the court which

calls it into existence and upon which it is attending. As the Supreme Court said in Brown v. U.S., 359 U.S. 41, 49, "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court * * * *." While it may be said that the act of Judge Chandler in going to the grand jury room and constituting it a court room was rather unusual, such action on his part was not one lacking in jurisdiction. This was a grand jury of the court. It had been originally charged by him and he had gone there at the request of the grand jury. The order filed on September 28, 1962, in the criminal case (Exhibit D attached to and made a part of the petition) sets out the basis for the dismissal of the criminal case without prejudice, and a part of the order reads as follows:

377-9] "However, even though on this occasion the grand jury requested the presence of the chief judge of this court, it is possible that a technical irregularity occurred in the proceeding in that the court as such, mentioning the defendant by name, supplied information in connection with the matter under consideration by the grand jury and regarding which an indictment was returned, and that said indictment should, therefore, be quashed without prejudice."

What occurred may have been sufficient to warrant the quashing of the indictment, but the order clearly only refers to a possible technical irregularity, which is a far cry from absence of jurisdiction. Defendant's conduct with respect to the grand jury was not so clearly without jurisdiction as to meet the test set out by the United States Supreme Court. The defendant's conduct was not clearly

without jurisdiction to have an investigation made concerning things which occurred in his court. The defendant's actions set forth in the petition, even if malicious as alleged, and possibly technically irregular, are not grounds for holding the defendant subject to a civil action.

The court for the reasons stated above sustains defendant's motion to dismiss, and the cause is dismised.

Roy W. Harper
U. S. District Judge

Filed July 1, 1964